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IN THE

Supreme Court of the United States

October Term, 1957

No. 47

VIRGINIA LAMBERT,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR REHEARING AND/OR MODIFICATION OF OPINION.

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PETITION FOR REHEARING AND/OR MODIFICATION OF OPINION.

Appellee respectfully petitions this Honorable Court for a rehearing and/or a modification of the opinion herein rendered.

Grounds for Rehearing.

A. The Conclusion Reached Is Contrary to Established Law and the Facts of This Case.

The general principle of law is recognized by this Court that all crimes need not include elements of knowledge as an essential ingredient. The cases cited in the opinion clearly establish the firmness of this principle. The decision of this Court as disclosed by the majority opinion actually turns upon a ruling on the denial of

the admission of evidence to show lack of knowledge on the part of appellant of the need to register. This is not the ground of appellant's appeal.

Appellant's attack under the due process clause was directed at the face of the ordinance and not at the evidence presented. This is clearly apparent from her argument (Appellant's Op. Br. pp. 12-19). Under the heading "Due Process" (Appellant's Op. Br. pp. 24-27), a general treatise on that subject was presented without any effort to apply such generalizations to the facts of this case. Appellant's "Conclusion" is directed at the constitutionality of the ordinance and not at the facts or application of the law (Appellant's Op. Br. p. 31). It is clearly apparent from the opinion of the majority of the Court herein rendered that all of appellant's contentions in that regard were rejected, yet the conclusion stated in the opinion is based solely upon an assumption of a state of facts based solely on conjecture arising out of the action of the trial court in sustaining the objection to the introduction of evidence and not established by proof in the case. The impact of this conclusion and the principle announced by reason thereof will have far-reaching implication and is directly contrary to the law.

Under the principle here announced, law enforcement officers must not arrest or charge a citizen with crime unless the officers can prove the citizen had knowledge of the existence of the law. Under such circumstances the purpose of registration laws is rendered ineffective. If the police have knowledge of the presence of "ex-convicts" within the community, there is no need to have them register. The very purpose of a registration law is to require persons unknown to the law-enforcement

agencies to come forward and give information of their presence. It would create an insurmountable task for law enforcement to require officers to search not only records of all local state courts but records of foreign state courts to first determine whether a person is an "ex-convict," and then search for such person in order to advise him of the requirement of the registration ordinance. The principle here announced will encourage the average citizen instead of trying to obey the law, to carefully endeavor to avoid any knowledge whatever of that which is declared to be criminal law. No longer is every cititzen presumed to be fully aware of the law which declares the doing of such acts, or the omission to do them, to be criminal. Undoubtedly, application of this rule is going to materially affect enforcement of criminal statutory provisions with no substantial benefit to the general public.

In *Chaplinsky v. New Hampshire*, 315 U. S. 568, this Court stated:

> "The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment."

Here the decision of the state court as to evidence concerning a defense is rejected.

B. No Issue of Fact Was Presented in This Appeal.

In appellant's "Jurisdictional Grounds" (Appellant's Op. Br. p. 2), it was asserted that "this appeal is taken pursuant to 28 U. S. C. 1257(2)." It was further pointed out that the basis of the appeal was the validity of a statute as being repugnant to the Constitution.

In appellant's notice of appeal to this court [R. 31-32] it was asserted that the questions presented by the appeal were: whether the ordinance was in violation of the Constitution, whether due process or equal protection was denied upon her arrest and trial, and whether the conviction had been obtained as a result of an unreasonable search and seizure. The last two questions clearly are not reviewable under the provisions of Section 1257(2), United States Code. The conclusion here reached is not based upon the invalidity of the ordinance but finds its basis solely upon a declared insufficiency of evidence.

It was stated by Mr. Justice Burton in *Haley v. Ohio*, 332 U. S. 596, that in testing due process the Supreme Court of the United States must first make sure of the facts, giving trial courts and juries that wide discretion in the determination of issues of fact to which a living record, as distinguished from a printed record, logically entitles them. That statement is most applicable here. There is not that degree of certainty here present in regard to the facts, established or assumed, upon which this Court should arrive at a conclusion such as was reached by the majority.

The opinion adopted by the majority of this Court bases its conclusion upon certain assumed facts, namely, that appellant had no knowledge of the requirement that she register under this ordinance, and that upon first be-

coming aware of her duty to register, appellant was given no opportunity to comply with the law and avoid its penalty. The truth or falsity of such assumed facts was never passed upon by the trier of the facts, yet the opinion herein rendered assumed such facts to be true, and assumed such facts to have been indisputably established. It is expressed therein that "We believe that actual knowledge of the duty to register and proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand;" and "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with Due Process." By its conclusion this Court is assuming that the prosecution will be unable to offer proof of the fact of actual knowledge of her duty to register, as well as proof upon the issue of the probability that she did possess such knowledge.

This Court, in passing upon the application of the Fourteenth Amendment to the rule excluding illegally obtained evidence in *Irvine v. California*, 347 U. S. 128, upheld the conviction and afforded the state courts the opportunity of reconsidering their evidentiary rules, either adopting or rejecting the federal rule. Here there is a completely new application of an established and accepted rule of law, that ignorance of the law will not excuse. "Due Process", should be made applicable to prosecutions had under accepted rules of law and notice given to courts and prosecutors that there is to be a new application of an old rule of law governing the quantum of proof required in certain types of cases. As was stated in *Irvine, supra*: "But to upset state convictions even before the states have had adequate opportunity to adopt

or reject the rule would be an unwarranted use of federal power."

The majority opinion indicates that due process requires proof of actual knowledge of the law or a showing be made of the probability of such knowledge before a conviction will be allowed to stand. The question is therefore one of fact which should be determined by the trier of facts. Generally, questions of fact are determined by the trier of the facts and such determination is binding on a reviewing court. The reviewing court is only permitted to determine whether there is substantial evidence in the record to support the finding by the trier of facts.

In the case of *Ah Sin v. Wittman*, 198 U. S. 500, this Court upheld a municipal ordinance which made it unlawful to visit or resort to a barred or barricaded house or room where gambling implements are exhibited or exposed to view, and declared such ordinance did not deprive anyone of his liberty without due process of law even if it authorized a conviction for an innocent visit to such place. It was there stated:

> "Plaintiff in error seeks to set aside a criminal law of the state, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the Yick Wo case, but that it was made so by the manner of its administration. This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state."

It has been declared by this Court that, although it stands ready to correct violations of constitutional rights, the burden of showing the essential unfairness violative

of such rights must be sustained by one who claims such injustice and seeks to have the result set aside, and it must be sustained not as a matter of speculation but as a demonstrable reality. (*United States v. Handy*, 351 U. S. 454.) No such showing was here made. The assumed state of facts is purely speculation.

When misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, the Supreme Court should vacate the judgment below and remand the case for further proceedings consistent with the principles laid down in the Supreme Court's opinion.

Maggio v. Zeitz, 333 U. S. 56.

The opinion herein rendered by the majority of this Court states that "Appellant, arrested on suspicion of another offense, . . ." No evidence of the cause of arrest was presented to the jury for their consideration of the question of whether or not the appellant had failed to registe. as an "ex-convict" under the Los Angeles ordinance. The statement on appeal, settled by the trial court, discloses that every element of the crime charged was proved without dispute, namely, that appellant had been convicted of two felonies; that she had been, and remained a resident of, the City of Los Angeles for more than five days; that at the time of her arrest her convictions had not been set aside in a manner provided by law, and that she had not registered with the police department prior to her arrest on the pending charge [R. 17]. This was also the conclusion of the appellate court [R. 30]. No attempt was made by appellant during the trial to establish or question the cause of her arrest [R. 17-18]. It was pointed out during oral argument to

this Court that, after the jury had returned a verdict of guilty and at the time of the making of a motion in arrest of judgment, appellant alluded to events which were alleged to have occurred at the time of her arrest [R. 19-20].

Here no question of illegal arrest, search, or seizure was involved. The evidence on behalf of the prosecution was introduced by way of stipulations [R. 17].

It is also stated in the opinion that "We must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused." Here again the majority of the Court has assumed and accepted as an established fact that which in fact was not established and which finds as its basis merely statements made by counsel in an offer of proof during the trial and in support of a motion in arrest of judgment, made some six days after the verdict of the jury had been returned. It was pointed out in Appellee's Brief, page 25, that under California procedure a motion in arrest of judgment is directed only to the sufficiency of the accusatory pleading or jurisdiction of the trial court. It was not so used in this matter. Appellant attempted to interject issues of police brutality, illegal arrest, and violation of civil rights in connection with a question directed solely to the legal sufficiency of the accusatory pleading. Evidence was not pertinent to such question and therefore the offer of proof was properly rejected.

The affirmation by the highest state court of a conviction of crime conclusively establishes in the United States Supreme Court the conformity of such conviction to state law.

Bute v. Illinois, 333 U. S. 640.

The opinion of the majority further states, "Nevertheless, this registrant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent." Support for this assertion is also found only in the statement of counsel, not in evidence, made in connection with the motion in arrest of judgment [R. 20]. This assumption is accepted as true in the face of appellee's statement set forth in the Supplemental Brief of Appellee, page 3. The prosecution was and is able to refute conclusively those facts. As stated in the letter from the Probation Officer, Appendix A, the appellant was advised to register October 31, 1951, and the evidence shows that on February 2, 1955, she was not registered. This Court could have assumed from such letter that appellant did in fact have actual knowledge of the ordinance and of her duty to register. This assumption is as reasonable and logical as the one accepted. The issue of credibility of appellant as a witness in that regard was not passed upon by the jury.

The opinion further states that "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, . . ." Here again it is assumed and accepted as an established fact that appellant did not know of the duty to register, and it is also assumed that the prosecution was unable to prove "the probability of such knowledge." Appellee submits that, as shown by the letter from the Probation Officer heretofore referred to, the prosecution could have, if required, introduced either in its case in chief or in rebuttal of appellant's denial of knowledge, evidence by the Probation Officer that appellant was personally advised of her duty to register. The record before this

Court does not support the conclusion that the facts therein presented deprived appellant of due process. It should be noted that the material facts sought to be introduced by evidence were stipulated to at the time of trial [R. 17]. There was no need at any time during said trial to refute by witnesses the alleged facts which are now accepted as having been established.

Conclusion.

It is respectfully requested that a rehearing be granted so that the issues may be more clearly pointed out; that the opinion be modified concluding that under the record here presented there is no showing that appellant was denied due process.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing and/or modification of Opinion is presented in good faith and not for delay.

PHILIP E. GREY.